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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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FOREWORD

Four briefs have been filed which take a position contrary to that of petitioner, namely, the brief of respondent EPA, the brief of intervenor-respondents State of Missouri and the Missouri Air Conservation Commission, the brief of *amicus curiae* Coalition for the Environment and the brief of *amicus curiae* the State of California. For some reason unknown to petitioner, none of these briefs attempts seriously to answer the bulk of the arguments set forth in petitioner's initial brief. This seems rather strange to us, since it is certainly customary in an answering brief to meet the arguments of your opponent, if it is at all possible to do so.

Under these circumstances we shall not engage in undue repetition of the arguments presented in our initial brief. Rather we shall answer the arguments which have been made in the four briefs mentioned above. And in doing so we shall first consider respondent EPA's brief, then discuss the points in intervenor's and amicus' briefs which have not already been covered.

RESPONDENT EPA'S BRIEF

1. Question Presented.

In its brief, as in its memorandum on the petition for certiorari (p. 2), respondent EPA states the question on which certiorari was granted differently and more broadly than it in fact is. Respondent does not confine the question to petitions filed more than 30 days after EPA approval on grounds arising after such 30-day period, although those are the facts of this case and that was the question on which certiorari was granted. Rather respondent broadens the question to include cases filed within the 30-day period, presumably because there are a number of such cases pending (as opposed to the instant, single case filed after the 30-day period) and respondent believes this Court should give the EPA some guidance. We have no complaint about giving the regulator (EPA) guidance. But we think fairness would also require that the regulated (such as Union Electric) be treated similarly.

2. Respondent's Statement of the Case.

Respondent points out that petitioner did not seek judicial review of the Missouri implementation plan within the 30-day period after promulgation (p. 5). Apparently its counsel's thought is to create some inference that petitioner did not pursue its "remedies." However, as we have repeatedly pointed out, the petition is based solely on grounds arising more than 30 days after promulgation. Additionally we mention that respondent devotes the remainder of its brief to the proposition that petitioner never in fact had the "remedies" that it infers.

In footnote 5 on page 6 of its brief, respondent EPA says that its May 30, 1974 notice of violation "included the Sioux Plant, even though the variance for that plant had not expired, because the variance for that plant (which ran to July 24, 1974) had not been submitted to EPA as a plan revision under Section 110(a)(3)(A) and was therefore not a part of the applicable implementation plan" (matter in parentheses added). We are really at a loss to know what respondent means by that statement which has absolutely no support in the record. If it is intended to infer that the Labadie and Meramec Plants were included in the notice of violation only because their state variances had expired, it makes no sense, because there is nothing in the Clean Air Act which requires the EPA to recognize state variances and it never has done so. If respondent's claim is that the Sioux state variance should have (or could have) been presented to the EPA as a revision under Section 110(a)(3)(A) of the Clean Air Act, it is equally without merit. This section of the Act says that the revision shall have been adopted by the State *"after reasonable notice and public hearing"* (emphasis added). But the Missouri statutes do not require any hearing as a condition to the grant of a variance.[1] Thus no Missouri

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[1] Section 203.110.4, R.S. Mo., 1969 says that

"Any person seeking a variance shall do so by filing a petition for variance with the executive secretary. The executive secretary shall promptly investigate the petition and make a recommendation as to the disposition thereof. Upon receiving the recommendation of the executive secretary, if the recommendation is against the granting of a variance, a hearing shall be held if requested as provided in section 203.100. *If the recommendation of the executive secretary is for the granting of a variance, the commission may do so without a hearing;* except that upon the petition of any person aggrieved by

variance can ever be approved by the EPA, unless the executive secretary of the Missouri Commission does not recommend the granting of a variance or there is an administrative contest in either of which events there would be a "hearing". Of course during the pendency of the administrative hearing and perhaps subsequent state judicial review, the EPA could proceed under the implementation plan as federal law. The result would be that the so-called "violator" might be fined large amounts or, if an individual, imprisoned, even though at the conclusion of all state hearings he was vindicated by the grant of a state variance and its approval by the EPA. Thus the Court's decision in *Train v. Natural Resources Defense Council*, 42 U.S. 60 (which incidentally came nearly a year after the Notice of Violation was issued by EPA against petitioner) is no answer to Union Electric's problems or those of any other Missouri company or person.

3. **Respondent's Argument.**

(a) **Petitions filed more than 30 days after EPA approval on grounds arising more than 30 days after such approval should not be treated the same as those filed within the 30-day period.**

Since the facts on which post 30-day review is sought must necessarily have arisen more than 30 days after the EPA approved the implementation plan, it should be perfectly clear that the EPA could not have made a record on those facts for

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the granting of the variance, a hearing shall be held as provided in section 203.100. In any hearing under this section, however, the burden of proof shall be on the person petitioning for a variance." (emphasis added) The great bulk of variances granted to petitioner, including this particular Sioux variance, as well as the great majority of those granted by the Missouri Agency to other parties, have been granted under the emphasized clause, that is without a hearing.

the Court of Appeals to review.[2] Consequently the Court of Appeals is going to have to conduct a factual inquiry, regardless of whether those facts relate to economic and technological feasibility or whether they are restricted, as respondent claims they should be, to facts "which, had they been known or in existence at the time the Administrator approved the plan, would have prevented him from giving his approval" (p. 12 of brief).

Respondent's interpretation of the "facts" which would permit post 30-day review is unreal and ephemeral. Its counsel does not provide us with an example of what he means and indeed he cannot. In truth there is absolutely no sensible or realistic situation that can be conjured up to give substance to his claim.

The only place the scope of facts permitting post 30-day review can be found is in the Senate Committee Report.[3] And there the Committee specifically stated its meaning that judicial review can be had "whenever it is alleged that significant new information has become available" (p. 42 of report). It should be perfectly apparent that such review must take into account this "significant new information"; and we cannot conceive of any new information which would be more important to a fair and proper administration of the act than new information demonstrating that it is technologically impossible to comply

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[2] There could be an administrative record for the Court to review *only* if, when a petition is filed with the Court of Appeals alleging grounds arising more than 30 days after EPA approval, the Court refers the matter to the EPA to investigate those grounds by an adjudicatory or legislative type hearing and then EPA files the record thus made with the Court. Nothing in the Clean Air Act permits such a procedure, but Courts have not been hesitant in interpreting the Clean Air Act the way they thought it ought to be. See, for instance, *Oljato Chapter v. Train*, 515 F.(2) 654, at pp. 665-6 (D.C. Ct. of App., 1975).

[3] Report No. 91-1196 of the Committee on Public Works, 91st Cong. 2nd Session (September 17, 1970).

with an emission limitation and that the economic cost to the public of an *attempt* to comply is manifestly against the public interest.

As we pointed out in our initial brief, Congress had in mind when enacting the Clean Air Act Amendments of 1970 the "fact" that "Greater use of natural gas for electric power generation may be required."[4] But Congress wisely realized that it did not know everything the future might hold. Thus it provided for a re-consideration of implementation plans in the light of new developments. And, as we previously noted, the complete extinguishment of any thought of using natural gas, the reduction in oil supplies, shortages and inefficiencies of low sulfur coal, and the failure to develop workable scrubbers are the important and significant new information crying out for a reappraisal of implementation plans. The type of new information, which counsel for respondent claims is all that is permissible and as to which he cannot give even one example, can hardly be other than petty inconsequential stuff—assuming that he is able to tell us what it is.

In footnote 10 on page 14 of its brief, respondent refers to the Energy Supply and Environmental Act of 1974. Of course that Act does not change Federally approved implementation plans in any respect. It simply says that a State *may* (but need not) submit a plan revision. But of course a state could have done precisely the same thing before this Act. See Sections 110(a)(2)(H) and 110(a)(3)(A) of the Clean Air Act.

If counsel for respondent is here inferring that Congress (or more correctly the executive appointees to the EPA) have complete and uncontrolled power to make final and judicially unreviewable decisions affecting the lives and fortunes of our millions of citizens, we certainly do not subscribe (and hope this Court will not subscribe) to such a totalitarian philosophy.

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[4] Id., p. 2.

In view of the Act's specific grant of a judicial review power on the basis of "significant new information", we submit that it is not the intent of Congress that the EPA be its own prosecutor, judge and jury.

(b) The Clean Air Act Amendments require judicial review of a provision in a state implementation plan, which is impossible to fulfill, when the National Ambient Air Standards will nevertheless be maintained (as they will be in this case).

In Section B on page 14 of its brief, respondent's counsel commence their discussion of a case, which this is not. That is they start their consideration (which is continued through most of the remaining part of their brief) of the scope of review of an EPA approved implementation plan by a petition to the Court of Appeals within 30 days after EPA approval.

Although that is not the situation in the instant case, we admit that the Eighth Circuit said in its decision that Section 307(b)(1) petitions should be treated the same, regardless of whether they are filed before or after expiration of the 30-day period; and we further admit that all of the decided cases involved petitions filed within the 30-day period.

Incidentally we note that counsel for respondent rely principally on decisions wherein the only parties were the Environmental Protection Agency and the Natural Resources Defense Council. Of course the question of judicial review of technical and economic feasibility was never actually presented in those cases. Neither of those parties was actually affected by such a question (so far as a particular case was concerned), and the utilities and industries (and the many millions of people they represent and affect) were neither represented nor heard. Thus all of the EPA-NRDC cases were decided on the basis of generalized, hypothetical situations. As we pointed out in our initial

brief (pp. 9-10), in every case wherein a utility or industry was a party (excepting only the instant case) the judges deciding it unanimously held that technological and economic factors may be judicially considered *at some time*.

On pages 17 and 18 of their brief, respondent's counsel intimate that only Sections 110(e) and 110(f) (42 USC 1857c-5(e) and (f) permit a consideration of technological or economic questions. But with respect to those sections, the Governor of the State must first take the initiative, and he is under no legal compulsion to do so. Thus we are dealing with political, not legal, matters. This impresses us as being much the same as saying that everyone arrested can be jailed without a trial and then released only if the Governor pardons him. Frankly we do not think our system of justice could have weathered the past 200 years, if based on political, rather than judicial, considerations.

In footnote 11 on page 18 of its brief, respondent refers to Section 111(a)(1) of the Act (which relates to standards for *new* stationery sources), to Section 202, which refers to emission standards for motor vehicles, to Section 211(c)(2)(A), which relates to control of fuels and fuel additives and to Section 231(b), which relates to aircraft emission standards. In each of those sections economic and technological factors are referred to, and EPA action must intially be taken in the light of them.[5]

Respondent makes the claim that Congress therefore intended that technological and economic factors cannot be considered

[5] We think it significant to note that Section 307(b)(1) directs a Court of Appeals (namely the one in the District of Columbia) to review the EPA's determination of technological and economic factors as to each type of emission covered by those four sections on grounds arising more than 30 days after EPA approval. Consequently the Court of Appeals would have to engage in these instances in the type of fact finding, which respondent seems so sure Congress never intended to require of a Federal Appellate Court.

insofar as state implementation plans are concerned, since those factors were not specifically mentioned in Section 110 (the implementation plan section).

We take an entirely different view of the matter. When the Clean Air Act Amendments were enacted in 1970, Congress did not have knowledge and knew it did not have knowledge of the economic and technical feasibility of possible requirements as to new stationary sources, motor vehicle emission standards, fuels and fuel additives or aircraft emission standards. However, it did then know, as was stated in its own Senate Committee Report,[6] that natural gas, if need be, could be utilized by utility and industrial plants to meet the air standards. Congress realized, however, that it was not infallible. Consequently it provided for judicial review in the event of significant new developments. Certainly the evaporation of Congress' idea that natural gas could solve the problem, along with the other new developments we have mentioned, constitute "significant new information" by which pre-existing implementation plans should be judged.

Pages 20 to 22 of respondents' brief, and the footnotes thereon, are replete with statements of the Senate Committee and Senators Muskie, Cooper, Prouty and Eagleton that an emission source must meet the Federal Standards or be closed down.[7] But none of the members of the Committee or individual Senators was ever asked the following truly significant question:

> "Senator, do you intend by this act to shut down a major portion of this country's electric generating plants, even

[6] See the preceding footnotes 3 and 4.

[7] As Union Electric alleged in its petition (A-13 and 14), both the National Primary and Secondary Air Quality Standards are being, and will continue to be, met, even though the Missouri emission standard in the implementation plan is not.

though the Federal Air Standards are being met and would continue to be met in the areas where those generating plants are located?"

We respectfully submit that each Senator would have emphatically responded "Of course not". And we think this Court should decide this case in the light of what it knows, and what virtually everybody else in the United States knows, would have been Congress' response. For that, we submit, really shows Congress' intent.

On page 24 of its brief, respondent implies that this case should be governed by the decision of the Court in *Train v. NRDC*, supra. We respectfully submit that the questions of technological and economic feasibility we present were never considered, let alone resolved, in that contest between the EPA and Natural Resources.

In his brief respondent's counsel refers to Bleicher's article in the December, 1975, issue of the Harvard Law Review[8] (p. 18 of brief), and we believe we should do the same.

On pages 350 and 351 of his article Professor Bleicher[9] discusses the situation where the EPA itself prepares a state implementation plan (as it may under Section 110(c)) and includes in such plan emission limitations that are stricter than necessary to meet the National Ambient Air Quality Standards. He quite properly comes to the conclusion that on judicial review such unreasonable emission limitations would have to be struck down by the Court of Appeals for the appropriate Circuit

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[8] Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316.

[9] Apparently he has only recently become a Professor, since at the beginning of the article (p. 316) he says that he was Deputy Director of Regulation and Enforcement in the Ohio Environmental Protection Agency until 1975.

as a violation both of the Clean Air Act and the Federal Constitution. Thus he says:

> "If the (unreasonable) requirement were imposed in a plan developed by the Administrator under section 110(c) (as where the state fails to submit an adequate plan), a subjectively unreasonable emissions limitation would at least violate statutory restraints on federal agency action, and perhaps the due process clause, because the Administrator would be destroying property for no apparent statutory purpose. To avoid taking illegal action . . . when he promulgated federal State Implementation Plans, the Administrator should give adequate consideration to technical and economic alternatives to subjectively unreasonable plans and afford relief where attainment of National Ambient Air Quality Standards or other statutory norms would not be jeopardized." (matter in parentheses added)

Turning now to the actual case before this Court, we have a situation where the emission limitation, which is unnecessary to fulfill National Air Quality Standards, was placed in the implementation plan by the State of Missouri. That plan, including this unnecessary emission limitation, was approved by the EPA and thus it has become Federal Law.[10] But respondent says that no matter how unwise, how unnecessary a provision in a state plan may be, neither the EPA nor the Courts nor the persons subject to it may ever raise any question about it. In other words both the EPA Administrator and the state can simply say, "I don't know if there is any reason for it, but it's the law." And the Court must accept that statement as final. We respectfully submit that this unique situation where a state purports to make federal law which the federal government itself could not legally make raises grave constitutional questions and surely could not be considered as reflecting the Congressional intent.

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[10] In fact respondent contends that the EPA had no choice but to take such action.

By far the most astounding part of respondent's brief is the following statement of its counsel on page 29:

> "In this case, petitioner's objections that it cannot comply with the state plan is a challenge to the wisdom of the State's choice and the appropriate place to resolve such matters is not in the federal court of appeals but in the responsible state agency. That indeed is the course petitioner is pursuing by seeking variances from the limitations affecting its three plants."

Does respondent mean by that statement that the Federal Courts have no authority with respect to state devised implementation plans, even though by EPA approval they have become Federal Law? Certainly the Clean Air Act itself (Section 113) gives the Federal Courts power to enforce them. Does respondent mean that EPA will not enforce the provisions of implementation plans while variance petitions are pending? If that is so, why did the EPA Administrator issue a notice of violation in the instant case. Certainly the past practice of the EPA has been to enforce the state devised implementation plan as Federal Law, quite regardless of what may be going on in State Courts or Administrative Bodies. Additionally as we earlier pointed out, state variances granted to utilities can rarely become EPA approved revisions of implementation plans, since they are normally (and legally) granted by the States without a hearing. And if there is a state hearing the process of ultimately getting a variance might take several years, during which the EPA could enforce the federal aspect of the plan by criminal conviction with attendant jail sentences and fines. Certainly it is not much of a victory for a person to ultimately obtain an EPA approved variance after paying large fines and/or spending several years in jail. Finally does respondent mean the EPA might stay its hand as a matter of grace during state proceedings. As to this we say that we are looking for protection by the law, not by the grace of the EPA.

Under this point, we want also to refer to respondent's contention on page 32 of its brief that this Court should adopt the EPA's interpretation of the Act, because administrative interpretations are entitled to great weight. We do not know whether EPA has issued an interpretative regulation on this point. But if EPA interprets the Act, as its counsel does in this case, that is to give itself the final, unreviewable, unquestioned right to make final, unreviewable, unquestioned decisions, which greatly affect the welfare of every person in the United States, we say that that is so far beyond the Congressional intent, as well as Constitutional guarantees, as to warrant this Court in stepping in.

As a very specific example we understand the EPA says that sulfur dioxide removal equipment is effective and will enable utilities to meet all state emission standards, which have by EPA approval become federal law. We say that this is not correct and that the installation of such ineffective equipment would cost so much that it would be manifestly against the public interest. The EPA apparently says that it should be entitled to make an unreviewable final decision on this matter, even though it intimately affects the welfare of everyone in the United States. We say that a final resolution of the matter should be made only after the testing process of an adversary judicial proceeding. We contend that this is what Congress intended, that a contrary intention would violate the Constitutional guarantee of due process and that an interpretation of Congress' intent should be made in the light of such Constitutional guarantee.

(c) Since an Act of Congress should be interpreted to be constitutional, rather than unconstitutional, when reasonably possible, it is necessary (if there is any doubt about constitutionality) for this Court to consider the constitutional question.

We believe that the foregoing proposition is subsidiary to the question on which certiorari was granted. Consequently respondent's statement outside the record as to briefs in the

Court of Appeals[11] and its statement as to the petition for certiorari are irrelevant. Virtually every Court or commentator that has dealt with this aspect of the Clean Air Act has considered the constitutional problem, and we do not see how this Court can justifiably do otherwise.

Despite the fact that respondent wants to brush aside the constitutional question, its counsel were impelled to consider the matter to some extent in their brief (pages 33-37). For one thing such counsel indicate that the Constitutional problem may be resolved in state judicial proceedings. But the state implementation plan becomes federal law enforceable by a federal court when approved by the EPA. As we have previously noted, the person paying large fines or, if an individual, perhaps imprisoned because of a federal conviction for violating federal law would hardly feel that his constitutional rights had been protected by the State Court's ultimate allowance of a state variance which EPA could and did approve.

We really have nothing to add under this point to the arguments presented at pages 29-32 of our initial brief. However, we again remind the Court that there can hardly be a clear and present danger to the welfare of the people of the United States, since the National Ambient Air Quality Standards are being fulfilled, even though the emission limitation is not.

INTERVENOR-RESPONDENTS' BRIEF

We believe that the arguments set forth in intervenor-respondents' brief have already been answered. However, there

[11] As a matter of fact we thought that the United States Court of Appeals for the Eighth Circuit would interpret the Clean Air Act in what we considered to be a constitutional manner without us mentioning the point.

are a couple of points we would like to make. On page 9 of their brief, intervenor-respondents state that the provisions of the Clean Air Act are clear and unambiguous. Consequently they assert that no resort to legislative history is necessary. We respectfully dissent from that view and submit that Congress has enacted very few statutes which are as obscure and ambiguous as the Clean Air Act Amendments.

On page 35 of their brief, as well as at other places, intervenor-respondents appear to contend that a conference with EPA officials, pursuant to Section 113(a)(4), constitutes a hearing which would satisfy the constitutional guarantee of due process.[12] We respectfully submit that this simply is not true. That section provides for a conference, not for a hearing. Thus it does not afford any legal rights to the person present. He is completely subject to the grace of whoever from EPA might be conducting or directing the conference. What the constitution requires, and what we want and believe we are entitled to, is the recognition of a legal right, which will be protected and enforced by the courts.

THE BRIEF OF AMICUS COALITION FOR THE ENVIRONMENT

We also believe that the arguments in this brief have already been answered. However, there are a few points we would like to make.

Apparently this amicus at least impliedly assumes that it is possible for petitioner to comply with the Missouri sulfur regulation. Thus on page 8 of its brief, counsel talks about the utilities being free to choose any method they desire to

[12] Respondent also implies that this is true in footnote 34 on pages 35-6 of its brief.

achieve compliance. We allege that compliance is impossible. And we think this question should be resolved in an adversary judicial proceeding, not by administrative fiat.

On page 11 of its brief amicus reaches outside of the record and states that at a January 5, 1972 hearing an executive vice-president of petitioner stated that if St. Louis people would spend $250,000,000 dollars, the SO_2 concentrations in the vicinity of the Labadie Plant would be greatly reduced. Apparently amicus desires by this statement to create the impression that sulfur dioxide removal equipment is completely effective.

We wish to point out that this statement was made long prior to the May 31, 1972 approval by the EPA of the Missouri implementation plan. In January 1972, when this statement was made, Union Electric was experimenting extensively (and expensively) with SO_2 removal equipment at its Meramec Plant. Many months after the implementation plan was approved, it was determined that SO_2 removal equipment simply would not do the job. And this is a part of the "significant new information", arising more than 30 days *after* the approval of the implementation plan, upon which our petition, which was brought more than 30 days *after* such approval, is based.

The only other reference we wish to make is to amicus' poetic fantasy on page 15 of its brief that this Court's decision in *Train v. NRDC, supra,* answers all of Union Electric's problems. That is absolutely not true, as we have already pointed out on several occasions.

THE BRIEF OF AMICUS STATE OF CALIFORNIA

We have studied this late arrival and do not believe it contains anything new. As we have previously indicated, we do not agree with California's apparent belief that it is proper to enact a law which says that the State will impose criminal penalties and civil sanctions upon a person until science develops a method of coping with a problem, even though there is no health hazard (since, as in this case, National Air Quality Standards are being met) and consequently there is no danger (let alone a clear and present one) to the public welfare. We note amicus' statement on p. 31 of its brief that section 113 could afford petitioner some relief, since in enforcement proceedings good faith efforts to comply should be considered. But, we submit, how can there be good faith efforts to comply in our case, since compliance is impossible. Additionally we want to register our belief that a discretion in the Administrative Agency and the Court to consider technical and economic factors in determining the penalties to be sought, or imposed, does not fulfill the constitutional guarantee of due process.

CONCLUSION

In our initial brief, at page 33, we said that the case should be remanded for the appointment of a Master to take evidence and make findings on the allegations in paragraphs 21 through 24 and 26 of our amended petition. Of course we did not mean to confine the scope of the facts to those enumerated allegations. We simply enumerated them, since we believe that they are the only ones which would be seriously contested. What we really pray is a remand of this case to the United States Court of Appeals for the Eighth Circuit for the purpose of appointing a master to hear evidence and make findings on the amended

petition and for the purpose of deciding the case on the basis of the master's report and the second prayer of such petition (A-8).

Respectfully submitted

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